

C IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1995 SESSION

<p>FILED</p> <p>January 26, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

<p>STATE OF TENNESSEE,</p> <p style="padding-left: 40px;">Appellee,</p> <p>V.</p> <p>DAVID LUCIAN GIBSON,</p> <p style="padding-left: 40px;">Appellant.</p>	<p>)</p> <p>) C.C.A. No. 01C01-9503-CC-00099</p> <p>)</p> <p>) Bedford County</p> <p>)</p> <p>) Hon. Charles Lee, Judge</p> <p>)</p> <p>) (Attempted First Degree Murder)</p> <p>)</p> <p>)</p>
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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
 Judge

OPINION

A jury convicted the appellant, David Lucian Gibson, of attempted first degree murder and imposed a \$50,000 fine. Sentencing the appellant as a Range I offender, the trial judge imposed a twenty-two year and nine month sentence. On appeal, the appellant raises three issues for review. First, he contends that the evidence is insufficient to support his conviction. Secondly, the appellant argues that the trial court erred in denying his motion for judgment of acquittal. Finally, he claims that the trial court erred in sentencing him. Following our review, we affirm.

The testimony presented at trial reveals that the appellant was married to the victim, Violet Gibson Tant, before she filed for and was granted a divorce. Ms. Tant's testimony detailed her life up to the time of the incident. She described appellant as a controlling husband who constantly degraded her throughout their marriage. After she filed for divorce, tensions escalated. The first episode occurred just before the divorce when Ms. Tant and the appellant had a dispute about where their son, Eric, would live. During this argument, the appellant retrieved a gun and said to Ms. Tant, "if you don't get out of here, I am going to blow your head off."

Other witnesses testified to the appellant's behavior during this period. Rowena Hatchett, Ms. Tant's sister, described a confrontation with the appellant. She testified that one evening she and her husband drove by Ms. Tant's home around 9:30 p.m. to check on her after the two had been to church. She knew that someone had recently been driving past Ms. Tant's home. As the Hatchetts drove by, they saw the appellant and Eric sitting in a parked car on the roadside near Ms. Tant's home. The appellant started to drive away but stopped his vehicle in the roadway when he saw the Hatchett vehicle behind him. When the Hatchetts attempted to pass, the appellant stopped them and inquired as to Ms. Tant's whereabouts. He told her he was concerned about his Grand Prix which Ms. Tant was driving. When Ms. Hatchett asked the appellant why it was any of

his concern, he responded, "you don't know how serious this is." The appellant drove away spinning tires and yelling but returned moments later to the same location just below Ms. Tant's mobile home.

Agnes Cunningham, Ms. Tant's sister, testified that based on a phone call from Eric during this same period she had become concerned about her sister. Later that same day, the appellant told Ms. Cunningham during a phone conversation that "Violet will pay." Ms. Tant's brother, Dean Smith, said that when the appellant received his divorce papers, he told Smith he was going to kill Violet. Smith heard the appellant make this statement on at least two other occasions and attempted to dissuade the appellant from carrying out his threat. During one conversation with Smith, the appellant said that he would first kill Violet and then himself. Later, the appellant showed Smith a pistol that he kept wrapped in a towel.

Following the divorce, tensions intensified when Ms. Tant began dating her current husband, Doug Tant. On Christmas, Deanna Wilkes (Ms. Tant's niece) and Alex Hill (Wilkes' boyfriend) spent the evening at Ms. Tant's home while she and Mr. Tant were visiting family. The appellant, accompanied by Eric, stopped at Ms. Tant's home while Wilkes and Hill were there. When he saw Ms. Wilkes' boyfriend, the appellant became angry thinking it was Violet's new love interest. He even told Hill that he was lucky because he was preparing to put sugar in the gas tank of Hill's truck. To protect Ms. Tant, Ms. Wilkes told the appellant that she had gone to the store. Soon after entering the home, the appellant spotted a gift under the tree for Eric from Doug. Realizing that Ms. Tant was seeing someone else, the appellant became enraged and threw the gift (a football) into the kitchen saying that he would buy his son a football. The appellant told Wilkes and Hill that if he ever saw Doug and Violet together, he would kill them. Just before they left, Ms. Wilkes overheard the appellant and Eric discuss a "plan" involving Eric and his use of a gun. Wilkes testified that she and Hill left Ms. Tant's home later that night. Alex Hill corroborated Wilkes' testimony.

When Ms. Tant and Doug returned to the mobile home late that night, they found a broken window, an overturned television, and the VCR hanging out the window. Bobby Cunningham, Ms. Tant's brother-in-law, later testified that he had repaired a broken window in the mobile home. He stated that the appellant, during a phone conversation, had apologized for the broken window and offered to pay for the repairs.

On the following day, December 26, Ms. Tant saw the appellant drive past her home eight or ten times. Though Doug Tant had never seen the appellant, he saw a silver car matching the description of the appellant's vehicle drive by several times that day. On the morning of December 27, the appellant and Eric drove past Ms. Tant's home many times. When the appellant eventually stopped, Ms. Tant exited her home against the wishes of Doug and walked toward the car with Eric's presents. Ms. Tant said that the appellant remained in the car at first but seconds later got out and said, "I'm tired of it. I'm not going to take any more." The appellant shot the victim three times from driver's side of the car and then walked around the car to where Ms. Tant had fallen. He then shot her a final time before getting back into his vehicle and driving away.

Mr. Tant testified that he had heard a gunshot just seconds after Ms. Tant walked out the front door. He then looked out a window and saw Ms. Tant lying in a ditch as the appellant fired the remaining shots into Ms. Tant's body. Tant also testified that after the appellant had finished shooting, he walked back to his car and drove away.

Ms. Tant was transported via LifeFlight to the Vanderbilt University Medical Center where she remained in intensive care for four days. Dr. Edmond Rutherford of Vanderbilt said that the victim had received life threatening injuries including a gunshot wound to the head, to the right breast, to the abdomen, and to the left forearm thereby fracturing her forearm. The bullet which entered her head is inoperable. Dr. Rutherford opined that these wounds could have been fatal.

The appellant testified on his own behalf and described how his wife, the victim, changed after a young man named Tim Craig moved in with them. Appellant stated that Ms. Tant, who had been extremely obese during their marriage, began losing weight and eventually lost over 100 pounds. The appellant further explained that Ms. Tant, who formerly never drank, began to drink and "party" at the trailer with Craig and several of his young friends. Appellant testified that he had always loved his wife and portrayed himself as submissive to her commands. During his testimony, however, the appellant stated that because he loved his wife he "let" her get a job and "let" her get a car.

When cross-examined about the testimony of several of the state's witnesses, the appellant responded that none of them were telling the truth and denied the incidents including the threats to kill the victim. When asked to explain his continual pattern of driving by or parking near the mobile home, the appellant said that Eric had wanted to see his mother but when they arrived to find that she was not at home, they parked some yards away and waited for her.

The appellant testified that he woke up crying on the morning of December 27 because he missed Violet so much. He and Eric decided to go to Tullahoma, via Hill Top Road where Violet lived, to purchase a new pair of boots for Eric. The appellant said that on the return trip, almost five miles from Violet's house, Eric told him that once before the divorce he caught Tim Craig and his mother having intercourse. The appellant continued that as he drove by the trailer, Violet and Doug were coming out the front door. When they saw him, Violet pushed Doug back inside. The appellant turned around and went back toward Violet's house where he stopped some yards away. Violet was coming toward him laughing and pointing. He then reached for the gun under the passenger's seat, jumped out of the car, and shot her. He stated that he was so upset and crazy that he could remember few specifics of the incident other than knowing he fired the shots and drove off. The appellant continued that about a mile down the road, he still had the gun in his hand and pointed it at himself.

However, Eric took the gun away and threw it out the window. He denied that he had established a plan to kill Violet.

When asked why the gun was in the car, the appellant explained that the gun had originally been left in his truck when Eric and a friend "stole" the truck earlier in the fall. He added that the gun belonged to Eric's friend's father and that he had not had a chance to return it though several weeks had passed since it was allegedly left in the truck. At some point, Eric removed the gun from the truck and placed it behind the passenger seat of the silver car. On cross-examination, the appellant admitted that he knew the gun was in the car three days before the incident. When they drove by the trailer that morning, he reached behind the passenger seat to retrieve it. The appellant said he "lost it" due to months of anger, hurt, and frustration. He later turned himself in to local authorities.

Eric testified on his father's behalf. He described the circumstances behind his discovery of his mother and Tim Craig having intercourse after they had returned from a softball game. Eric also admitted that he wrote the note which was left in Ms. Tant's mail box on the 26th. The note contained expletives and referred to Mr. Tant's gift to Eric. Eric also told the jury that after his father shot Ms. Tant, he yelled, "Die, bitch, die." He further admitted that he and his father drove by Ms. Tant's home on many occasions to check on her. Eric corroborated a significant portion of his father's testimony.

I.

The appellant's first claim is that the evidence was insufficient to support his conviction for attempted first degree murder. Though it is unclear from his brief, it appears that his sole claim is that the jury should have convicted him of attempted voluntary manslaughter.

In a sufficiency of the evidence challenge, the relevant question for this Court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); T.R.A.P. 13(e). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978).

In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405 (Tenn. 1983). Moreover, a guilty verdict replaces the presumption of innocence with the presumption of guilt. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The appellant has the burden of overcoming this presumption. Id.

Criminal attempt requires a finding that the appellant acted with the kind of culpability required for first degree murder. Tenn. Code Ann. § 39-12-101(a)(1991). First degree murder is defined as "[a]n intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (1991). A "[d]eliberate act" is defined in our criminal code as "one performed with a cool purpose" while a "[p]remeditated act" is "one done after the exercise of reflection and judgment. Tenn. Code Ann. § 39-13-201(b)(1) & (2) (1991). The appellant maintains that he did not act with such an intent. Instead, he claims that he shot his wife in the heat of passion as relegated in the offense of voluntary manslaughter. "Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a) (1991).

In State v. Jespersen, No. 03C01-9206-CR-00212 (Tenn. Crim. App. Aug. 11, 1993), this Court said that "the state ha[s] the burden of proving beyond a

reasonable doubt that the defendant thought about killing the victim before the shootings, then acted with a 'cool purpose ... free from the passions of the moment,' in the absence of adequate provocation." Slip op. at 13 (quoting State v. West, 844 S.W.2d 144, 147 (Tenn. 1992)) (citations omitted). The state's witnesses showed that the appellant had expressed his intent to kill Violet. Further, Ms. Tant's niece said she had heard the appellant and Eric discussing a "plan" which involved the use of a gun and Ms. Tant. In addition, other witnesses watched the appellant continually drive by Ms. Tant's home or park nearby at all hours awaiting Ms. Tant's return. Here, the state presented the jury with sufficient evidence to find the elements necessary to convict the appellant of attempted first degree murder. Only through circumstances beyond the appellant's control, the victim survived the four gunshot wounds.

Alternatively, the appellant presented his testimony and that of his son, Eric, in an attempt to establish provocation and "heat of passion." He had hoped to convince the jury that the state's witnesses were untruthful, that he loved his wife to an extreme, and that he "lost it" and "went crazy" when his son told him that morning of Ms. Tant's sexual relations with Tim Craig. Here, the jury obviously concluded that the son's testimony that his mother and Tim Craig had intercourse some time ago was either unbelievable or insufficient to provoke passion which would have caused a reasonable person to act in such an irrational manner.

The trial judge charged the jury as to first degree murder and lesser included offenses including voluntary manslaughter. Therefore, the jury knew its options but chose to believe the state's witnesses. The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978). We will not usurp the jury's function. We find that the evidence was sufficient to support the conviction. This issue is without merit.

II.

In his second related issue, the appellant argues that the trial court erred in denying his motion for judgment of acquittal. The appellant also styled his motion for a new trial to alternatively include a motion for judgment of acquittal. Both motions were denied.

Rule 29 of the Tennessee Rules of Criminal Procedure provides that the trial court "shall order the entry of judgment of acquittal" where the evidence is insufficient to sustain a conviction on the offenses charged. Tenn. R. Crim. P. 29(a). In so reviewing, the trial court and this Court have the duty to examine only the state's evidence and "to allow all reasonable inferences from it in the state's favor." State v. Hall, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). If there is "any dispute as to any material determinative evidence, or any doubt as to the conclusion to be drawn from the evidence of the [s]tate, the trial judge should properly overrule the motion" and it will be the duty of this Court to affirm. Id. Such a motion is warranted only where the evidence fails to establish the elements of the offense. State v. Keeley, No. 01C01-9403-CR-00095 (Tenn. Crim. App. Aug. 25, 1995).

Because we have already found that the evidence was sufficient to establish the elements of the offenses, we find that the trial court properly denied the appellant's motion. This issue is similarly without merit.

III.

In the appellant's final challenge he contends that the trial court erred in sentencing him to twenty-two years and nine months. The defendant claims that based upon "his prior history and relationship to the community" he should have received the minimum sentence. The defendant also says that the trial judge placed little weight on the sole applicable mitigating factor.

Our review of the sentence imposed by the trial court is de novo with a presumption that the determinations of the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). This presumption is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting our review, we consider the evidence presented at the sentencing hearing, the presentence report, the sentencing principles, arguments of counsel, statements of the defendant, the nature and circumstances of the offense, mitigating and enhancement factors, and the defendant's amenability to rehabilitation. Tenn. Code Ann. § 40-35-210(b) (1990); Ashby, 823 S.W.2d at 168.

The presumptive sentence shall be the minimum in the range if no enhancement or mitigating factors exist. Tenn. Code Ann. § 40-35-210(c) (1990). However, if both enhancement and mitigating factors exist, the court must start at the minimum sentence in the range and enhance the sentence within the range as appropriate. Then the trial judge will reduce the sentence within the range as appropriate for the mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e) (1990).

The appellant was convicted of attempted first degree murder, a Class A felony. As a Range I offender, the potential range of punishment was from fifteen to twenty-five years. Tenn. Code Ann. § 40-35-101 (1990). At the sentencing hearing, the trial court found that Tenn. Code Ann. § 40-35-113(13) (1990)¹ should apply but only minimally due to the appellant's post-incarceration willingness to rehabilitate himself. As enhancement factors the trial court found that: the appellant has a previous history of criminal convictions in addition to

¹The trial court considered Tenn. Code Ann. §§ 40-35-113(3) and (11) before rejecting them as inapplicable. However, as noted by the state, the court misstated that the one mitigating factor he found, i.e., the appellant's actions since incarceration to rehabilitate himself, was Tenn. Code Ann. § 40-35-113(3). Instead, this mitigating factor would fall under Tenn. Code Ann. § 40-35-113(13), the "catchall" provision.

those necessary to establish the range; the appellant treated a victim with exceptional cruelty during the commission of the offense; the personal injuries inflicted upon the victim were particularly great and that the appellant possessed or employed a firearm during the commission of the offense. Tenn. Code Ann. § 40-35-114(1), (5), (6) & (9) (1990). The court enhanced the sentence to twenty-three years and reduced it by three months in mitigation.

Although the appellant does not specifically challenge the enhancement factors, upon review we find that each factor enumerated above was applicable here. The trial court first found that the appellant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range. Tenn. Code Ann. § 40-35-114(1) (1990). The presentence report shows that the appellant has two prior felony convictions. Because he was sentenced as a Range I offender, the convictions were properly considered in enhancement.

The second applicable enhancement factor found by the trial judge was that the appellant treated the victim with exceptional cruelty during the commission of the offense. Tenn. Code Ann. § 40-35-114(5) (1990). The testimony at trial showed that the appellant shot the victim three times from the driver's side of the vehicle. The victim testified that she laid on the ground and prayed that she would not die. Seconds later, the appellant walked around to the passenger side of the car and shot the victim in the back of her head. We find that these circumstances constitute exceptional cruelty. This factor was properly considered.

The final two factors applied by the trial court are that the personal injuries inflicted upon the victim were particularly great and that a firearm was employed during the commission of the offense. Tenn. Code Ann. §§ 40-35-114(6) & (9) (1990). The trial court found that some \$27,000 in medical bills were attributable to this incident and noted the immeasurable damage both physically and psychologically inflicted upon this victim. In addition, it is undisputed that a

firearm was used to commit the offense. This Court has previously determined that these enhancement factors are appropriate in attempted first degree murder cases because murder may be attempted without actually causing any injury and through means other than use of a firearm. See State v. Holmes, No. 01C01-9303-CC-00090 (Tenn. Crim. App. Aug. 11, 1994). Thus, these factors were properly considered.

Without stating a basis for his request, the appellant concludes that he should receive the minimum sentence. The weight given the enhancement and mitigating factors lies within the discretion of the trial judge. Moss v. State, 727 S.W.2d 229, 238 (Tenn. 1986). We do not find that the trial judge abused his discretion. The sentence imposed is supported by the record. This issue is, therefore, meritless.

The judgment of the trial court is, in all respects,

AFFIRMED.

PAUL G. SUMMERS, Judge

CONCUR:

JOE B. JONES, Presiding Judge

JOSEPH M. TIPTON, Judge